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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel. WILLIAM JEFFREY GILLIAM

Petitioners,

v.

GENERAL DYNAMICS CORPORATION

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether entities subject to the provisions of the False Claims Act, 31 U.S.C. 3729 and 3730, are entitled to *Noerr-Pennington* First Amendment immunity when they choose to provide false and misleading testimony to the U.S. Congress.
2. Whether the Fourth Circuit's decision affirming the district court's grant of summary judgment represents an important conflict within the circuits on the issue of *Noerr-Pennington* First Amendment immunity, so as to call for the exercise of this Court's supervisory powers.
3. Whether the Fourth Circuit's decision affirming the district court's grant of summary judgment represents an important conflict within the circuits and within the Fourth Circuit, from the opinion of a different Fourth Circuit panel in *Newport News Shipbuilding v. General Dynamics Corporation,* 960 F.2d 386 (4th Cir. 1992) calling for the exercise of this Court's supervisory powers.
4. Whether the decision below rejecting false certification liability under the False Claims Act, 31 U.S.C. § 3729 *et seq.* represents an important

split of authority within the Circuits calling for the exercise of this Court's supervisory powers.

LIST OF PARTIES

United States of America, *ex rel.* William Jeffrey Gilliam

General Dynamics Corporation

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW.....i

LIST OF PARTIES.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....iv

PETITION FOR WRIT OF CERTIORARI.....1

OPINIONS BELOW.....1

JURISDICTIONAL STATEMENT.....2

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....3
History of Proceedings.....3
Summary of Facts.....3
Introduction.....3
The Award of a Third *Seawolf* submarine to GD...5
GD's Historical Relationship with its Principal Customer.....7
Petitioner's Purchase of MESC from GD.....9
Commencement of the False Claims Act Civil Action.....11
Summary Judgment in Favor of GD.....12

REASONS FOR GRANTING THE WRIT.....13
I. ENTITIES SUBJECT TO THE PROVISIONS OF THE FALSE CLAIMS ACT DO NOT HAVE FIRST

AMENDMENT IMMUNITY WHEN THEY CHOOSE TO PROVIDE FALSE AND MISLEADING TESTIMONY TO THE U.S. CONGRESS.....13

A. James Turner's Statement to the Petitioner were True for Purposes of Summary Judgment.....13

B. The Fourth Circuit's Decision Upholding Summary Judgment Implies a First Amendment Immunity for False Statements Made to the U.S. Congress.....15

C. Since there is no *Noerr-Pennington* First Amendment Privilege to Mislead the Congress This Court Should Exercise its Supervisory Powers And Grant Certiorari.....17

II. THE DECISIONS BELOW REPRESENT IMPORTANT CONFLICTS WITHIN THE CIRCUITS AS WELL AS WITHIN THE FOURTH CIRCUIT.....18

A. In *Newport News* the Fourth Circuit Overturned the District Court's Finding that the Navy's 1991 Decision to Avoid Spending $73 Million to Maintain Two Submarine Shipyards was "Reluctant and Rational".....18

B. By Affirming the District Court's Grant of Summary Judgment the Fourth Circuit Stated that a 1993 Decision to Spend $1.5 Billion to Maintain Two Submarine Shipyards was Consistent with its 1991 Decision in *Newport News*.....20

C. Since the Decisions Below are Incompatible within the Circuit and Since these Decisions Represent an Important Conflict between the Circuits, this Court Should Grant Certiorari to Resolve the Conflicts.....23

III. THE DECISION BELOW FAILED TO RECOGNIZE FALSE CERTIFICATION LIABILITY UNDER THE FALSE CLAIMS ACT AND DISREGARDED THE CONGRESSIONAL INTENT OF THE FALSE CLAIMS ACT.....23

A. The Decision Below Eviscerates the Congressional Intent of the False Claims Act.....23

B. By Affirming the District Court's Decision the Court of Appeals has Denied False Claims Act Liability for False Certifications.....27

C. Since the Fourth Circuits Decision Eviscerates Congressional Intent and Represents an Important Conflict within the Circuits, this Court should Grant Certiorari to Restore Congressional Intent and Resolve the Inter-Circuit Conflicts.....29

CONCLUSION.....30

APPENDIX

Order Denying Motion to Dismiss.....App. 1
Order Granting Summary Judgment.....App. 10
Order Affirming Summary Judgment.....App. 11
Opinion Affirming Summary Judgment.....App. 13
Title 2 § 192.....App. 17
Title 10 § 2305.....App.17
Title 18 § 1001.....App. 28
Title 18 § 1003.....App. 29
Title 31 § 3729.....App. 30
Title 31 § 3730.....App. 32

TABLE OF AUTHORITIES

FEDERAL CASES

Ab-Tech Construction, Inc. v. United States, 31 Fed.Cl. 429 (Fed.Cl. 1994).....29
California Motor Transport Co. et al. v. Trucking Unlimited et al., 404 U.S. 513 (1972).....17
E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127(1961).....15
Harrison v. Westinghouse Savannah River Co. 176 F.3d 776 (4th Cir. 1999).....15, 19
IGEN Int'l., Inc. v. Roche Diagnostics GMBH, 335 F.3d 303 (4th Cir. 2003).....15
John Bruce Hubbard v. United States, 514 U.S. 695 (1995).....17
Mikes v. Straus, 274 F.3d 687 (2nd Cir. 2001).....29
Newport News and Shipbuilding and Drydock Company v. U.S. Navy et al, 771 F.Supp. 739 (E.D. Va. 1991)...19
Newport News and Shipbuilding and Drydock Company v. U.S. Navy et al, 960 F.2d 386 (4th Cir. 1992).....19
Rainwater v. United States, 356 U.S. 590, 592 (1958)...29
U.S. ex rel. Thompson v. Columbia Healthcare Corp., 125 F.3d 899 (5th cir. 1997).....28
Ulstein Maritime Ltd. V. United States 833 F.2d 1052, 1054 (1st Cir. 1987).....20
UMW v. Pennington et al., 381 U.S. 637 (1965).....16
United States ex rel. Berge v. Board of Trustees of the University of Alabama, 104 F.3d 1453 (4th Cir. 1997).15
United States ex rel. Joslin v. Community Home Health of Maryland, Inc., 984 F.Supp. 374, 384-385 (D. Md. 1997).....28
United States v. Bramblett, 348 U.S. 503 (1955).....17
United States v. Niefert White Company, 390 U.S. 228, 232 (1968).....25
United States v. Southland Management Corp., 288 F.3d 665, 679 (5th Cir. 2002).....28
Watkins v. United States, 354 U.S. 178, 187 (1957).....16

FEDERAL STATUTES

10 U.S.C. § 2305.....2, 18, 19

10 U.S.C. §4501.....18
104 Stat. 1498 (1990).....18
18 U.S.C. § 1001.....2, 17
18 U.S.C. § 1003.....2, 17
2 U.S.C. § 192.....2, 16
28 U.S.C. §1254(1).....2
31 U.S.C. § 3729.....passum
31 U.S.C. §§ 3129.....passum
31 U.S.C. §§3729.....passum
H.R. No. 101-665.....19
Pub.L.No. 101-510.....18
S.Rep. No. 101-384.....19

PETITION FOR WRIT OF CERTIORARI

Petitioner and relator William Jeffrey Gilliam, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on July 21, 2004, and the order denying petition for rehearing and rehearing *en banc* entered on September 8, 2004.

OPINIONS BELOW

United States ex rel. William J. Gilliam v. General Dynamics Corporation, civil action no. 01-3023 U.S. District Court, District of S.C., 11/7/2001 Order denying defendant's motion to dismiss, reprinted at App. 1.

United States ex rel. William J. Gilliam v. General Dynamics Corporation, civil action no. 01-3023 U.S. District Court, District of S.C., 10/15/2002 Order granting defendant's motion for summary judgment, reprinted at App. 10.

United States ex rel. William J. Gilliam v. General Dynamics Corporation, civil action no. 01-3023 U.S. District Court, District of S.C. 7/21/2003 Order denying plaintiff's motion to alter or amend judgment.

United States ex rel. William J. Gilliam v. General Dynamics Corporation, appeal no. 03-1912 U.S. Court of Appeals, Fourth Circuit, 7/21/2004 Order affirming summary judgment, reprinted at App. 13.

United States ex rel. William J. Gilliam v. General Dynamics Corporation, appeal no. 03-1912 U.S. Court of Appeals, Fourth Circuit, 9/8/2004 Order denying appellant's request for rehearing and rehearing *en banc,*

JURISDICTIONAL STATEMENT

The final judgment of the court of appeals was entered on September 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

2 U.S.C. § 192, reprinted at App. 17

10 U.S.C § 2305, reprinted at App. 17

18 U.S.C. § 1001, reprinted at App. 28

18 U.S.C. § 1003, reprinted at App. 29

31 U.S.C. §3729, reprinted at App. 30

31 U.S.C. § 3130, reprinted at App. 32

STATEMENT OF THE CASE

HISTORY OF PROCEEDINGS

Petitioner filed the original complaint on May 7, 1999 in the U.S. Bankruptcy Court for the District of South Carolina, case no. 96-76468-B, adversary no. 99-80152. The complaint alleged violations of 31 U.S.C. § 3729 *et seq.* The complaint was filed under seal and in December 2000 the United States declined to intervene and the defendant was served with a copy of the summons and complaint.

Defendant General Dynamics Corporation moved to withdraw reference to the United States District Court for the District of South Carolina. The defendant also filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b). On October 2, 2001 the district court granted the motion to withdraw reference, and on October 24, 2001 the district court conducted a hearing on the defendant's motion to dismiss.

On November 7, 2001 District Court Judge David Norton issued an order denying defendant's motion to

dismiss and issuing an order directing the parties to conduct limited discovery on the issue of materiality and submit motions for summary judgment by March 15, 2002.

On December 18, 2001 the case was reassigned to District Court Judge Patrick Michael Duffy. On February 12, 2002 petitioner filed an affidavit and request for entry of default citing defendant's failure to answer the complaint. Default was entered on February 12, 2002.

On March 11, 2002 the case was reassigned to District Court Judge C. Weston Houck.

On April 10, 2002 defendant's motion for relief from default was granted.

On September 20, 2002 petitioner filed a motion to compel discovery and on September 25, 2002 the district court granted the motion to compel.

On October 15, 2002 the district court granted defendant's motion for summary judgment finding that the defendant did not make false statements to the United States and that the statements at issue were not material.

On October 28, 2002 petitioner filed a motion to alter or amend judgment and on June 19, 2003 the district court heard and denied petitioner's motion to alter or amend judgment.

On July 21, 2003 petitioner filed a notice of appeal.

On May 7, 2004 the court of appeals heard oral arguments from petitioner and defendant and on July 12, 2004 the court of appeals issued an order confirming the district court's grant of summary judgment in favor of defendant.

On July 26, 2004 petitioner filed a request for rehearing and rehearing *en banc*. On September 8, 2004 the court of appeals denied petitioner's request for rehearing *en banc*.

SUMMARY OF FACTS

Introduction

Prior to the election of Ronald Reagan, General Dynamics Corporation and other suppliers of ships to the

U.S. Navy maintained substantial commercial shipbuilding businesses. In 1981 the new administration announced plans to build a 600-ship Navy. Most defense contractors elected to abandon commercial shipbuilding in favor of Navy shipbuilding.

At the end of the Cold War General Dynamics Corporation ("GD") began an aggressive effort to re-establish commercial shipbuilding in order to ameliorate the effect of rapid cancellation of Navy submarine contracts. GD's December 1992 Report to Shareholders on Form 10-K claimed sufficient shipbuilding business to sustain GD's manufacturing facilities thru the end of the decade. GD claimed that its forecasts included both government and non-government revenue. GD's internal forecasts $1.5 billion of commercial sales by 1998 were disclosed to the petitioner by James Turner, petitioner's cousin and GD's President.

In September 1992 GD was asked by the DOD to forecast its shipyard utilization so that the DOD could assess the viability of the defense industrial base. GD informed the DOD that sales of its Electric Boat Division would decline from $1.5 billion in 1992 to $665 million by 1998; less than sufficient to sustain shipyard viability. On the basis of this statement, in October 1993 the DOD determined that it would recommend awarding GD a no-bid contract to construct a third *Seawolf* class submarine. The award was characterized by the DOD as the most cost effective method of ensuring the survival of GD's submarine manufacturing capability.

Petitioner's False Claims Act complaint alleges that either GD's statements to shareholders, in the 1992 GD Report on Form 10-K were false and fraudulent, or its disclosures to the DOD in September 1992 were false and fraudulent. If the statements to the DOD were false and fraudulent, then GD violated the False Claims Act by making false statements to the U.S. to obtain a contract.

If the statements to shareholders and to the SEC were false and fraudulent, then GD likewise violated the False Claims Act by falsely certifying compliance with federal

statutes, in this case the federal securities laws, in order to induce the government to award GD the *Seawolf* contract.

The Award of a Third *Seawolf* Submarine to GD

At the end of the Cold War General Dynamics Corporation ("GD") was faced with the cancellation of an entire class of nuclear submarines, the so-called *Seawolf* class of nuclear attack submarines. GD formed Marine Energy Systems Corporation ("MESC") in order to pursue commercial activities as a replacement for and supplement to anticipated cuts in defense spending.

GD informed shareholders that MESC and its other commercial businesses would 'bridge' an anticipated manufacturing gap between the end of construction of existing submarine orders and the construction of a new class of submarines then forecast to begin in 1998. GD's assurances were set forth in the Management Discussion & Analysis section of GD's Report to shareholders on Form 10-K for 1992 stating "the company expects that future awards, under the *Seawolf* program and other related government and **non-government** businesses, will utilize the company's production facilities until (year 2000)(emphasis added)." GD justified this forecast in substantial part on its internal forecast of $1.5 billion in MESC revenues by 1998. GD described its commercial businesses as being compatible with its existing submarine manufacturing, and while GD stated that these businesses were not replacements for continued submarine manufacturing, GD claimed that commercial manufacturing would assist it in maintaining affordable, competitive submarine shipbuilding skills.

At the same time that GD was informing its public shareholders and the U.S. Securities and Exchange Commission ("SEC") of its positive forecast of future business it was informing the United States Department of Defense (in September 1992) that it forecast sales of EB declining from a 1992 total of approximately $1.5 billion to approximately $665 million in 1998. In making this representation to the United States GD affirmatively

represented that it was including forecasts for MESC and all of its commercial businesses in the figures submitted to the United States.

GD also informed the United States that a sales level of $655 million was insufficient to maintain its shipyard operations. Relying on these representations, in late 1993 the United States Department of Defense announced that it intended to seek funding from the Congress for an additional *Seawolf* submarine contract, to be awarded to GD, and that this authorization would include an authorization to "sole source" the submarine from GD. The DOD stated at the time of this announcement that the third *Seawolf* submarine was not justified based on defense needs but was justified in order to ensure GD's survival as a builder of submarines.

When GD learned that the DOD intended to recommend awarding GD a no-bid contract for a third *Seawolf* submarine, GD understood that it needed to immediately address the dilemma caused by the conflict between the forecasts that it had supplied to the United States Department of Defense (1992-1998 EB sales decreasing from $1.5 million to $665 million) as contrasted with the forecasts supplied to shareholders and the SEC (1992-1998 EB sales increasing from $1.5 billion to almost $2 billion). The DOD decision was announced in October 1993 and in December 1993, GD announced that it intended to terminate or dispose of all of its commercial businesses. GD's 1993 Report to Shareholders on Form 10-K reveals GD's changed outlook for its submarine manufacturing business, stating "unless the company is awarded a third *Seawolf* construction contract and other related government business, the current backlog is insufficient to sustain operations until (2000)."

Contrasting GD's 1992 and 1993 Reports to Shareholders on Form 10-K shows that GD claimed that it could sustain shipyard operations in 1992 when it still retained its commercial businesses. In 1993, without these businesses GD expressly states that only a third *Seawolf* will enable GD to sustain its shipyard operations thru the end of the decade.

GD's Historical Relationship with its Principal Customer

The United States Department of Defense has long been GD's primary customer. GD has a long history of abusing its relationship with its primary customer.

In 1976 GD filed a claim against the Navy for $544 million in "Navy caused" cost overruns. In 1978 GD increased their claim to $643 million. The DOJ accused GD of making artificially low bids to justify "cost overruns."

In 1984 former GD President P. Takis Veliotis provided testimony to a Senate Committee that traveled to Greece in order to obtain Veliotis' testimony. With the use of Veliotis' testimony Senate and House Subcommittee Hearings produced testimony and evidence, including GD documents, showing that "Navy officials collaborated with the contractor to jointly contrive an explanation for the settlement that would be approved by Congress." *A Billion Dollar Boondoggle,* by John Riley, quoting from *Report of Joint Economic Committee Report,* Senator William Proxmire. The Riley book chronicles GD's recent history of malfeasance, including the existence, in 1986, of at three ongoing federal grand jury investigations and 15 DOD investigations, all alleging misconduct by GD and its senior executives.

In 1986 Michael Barrett, Chief Counsel and Staff Director, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives, authored a paper entitled *Congressional Oversight: the SEC and the Accounting Profession.* Barrett's paper begins by stating:

> "Financial reporting by defense contractors is essentially manipulative...General Dynamics...is a good example of some of the problems with financial reporting in the defense industry. Takis Veliotis (former GD President) who fled to Greece to escape prosecution...produced essentially three sets of corporate records that he had placed in safekeeping for just such an eventuality. The first set was the

> usual SEC-type of information, and the second set was the data GD supplied to the Navy showing stages of completion for submarines, including dates of completion and the hours of labor being expended. However, the third set was the most interesting. That set, for the company's **internal use**, showed what the corporate executives projected the second set should actually look like....Veliotis produced evidence strongly supporting his allegation that the company (manipulated its stock price)...when the Subcommittee sent GAO auditors to GD...the company demonstrated its complete cooperation...by turning off the heat...I received a call from one auditor who lamented that his ballpoint pen would not write at 35 degrees. Other similarly harassing tactics dogged those auditors during the course of their work for the Subcommittee (emphasis added)." *Barrett Paper*, p.3-4.

Just prior to his retirement as the head of the Navy's nuclear program, former Admiral Hyman Rickover accused GD of trying to "cheat" the Navy. GD responded by accusing Rickover of accepting $67,000.00 of gifts from GD during his career. When asked by reporter Diane Sawyer why GD would accuse the Admiral of accepting gratuities, Rickover stated "I accused them of false claims."

In recent filings in the *MESC v. GD* adversary proceeding in the South Carolina bankruptcy court GD described the petitioner as "a man who, after his business empire collapsed, became a serial-litigant intent on recovering his lost fortune by suing everyone with whom he came in contact." GD Mtn. SJ 10/13/04 no. 98-80220.

GD's appellee brief below referred to petitioner's allegation that GD "kept two sets of books," referring to the discrepancy in GD's disclosures of commercial sales forecasts to the SEC and to the DOD. GD argued "simply put, GD did not have 'two sets of books,' Gilliam's catch phrase in the district court." GD App. B. p.25.

GD continues to hire retired Admirals and Generals as corporate employees and as outside directors.

Petitioner's Purchase of MESC from GD

GD's December 1993 decision to sell MESC resulted in the June 1994 signing of an Asset Purchase Agreement with the petitioner. At the time of the signing of the agreement the petitioner and James Turner (then President of GD's Electric Boat Division and later President of GD) met and discussed Turner's outlook on MESC's business. Turner described his disagreement with the decision made by GD management to divest MESC and GD's other commercial businesses. Since Turner and petitioner are second cousins, their discussions were both personal and candid. Turner stated that he believed that GD's commercial businesses would achieve in excess of $1.5 billion in sales prior to the year 2000.

GD employees informed the petitioner that MESC had proprietary technology, a substantial backlog of expected sales, and an important joint venture partnership with Westinghouse Electric Corporation. In addition to the Asset Purchase Agreement, GD signed a 5 year Technical Support Agreement with MESC, thereby allowing MESC the ability to use GD engineers to run the proprietary software that MESC was acquiring for purposes of designing and building its products.

Just prior to James Turner's May 1995 U.S. Senate testimony MESC signed a $450 million commercial contract. This contract was consistent with GD's December 1992 commercial business disclosures to shareholders and the SEC, but inconsistent with GD's September 1992 commercial business disclosures to the DOD (the DOD forecasts predicted less than $15 million of commercial revenues and MESC had just signed a $450 million contract).

MESC completed its contract work by utilizing its Technical Support Agreement with GD. In 1997 MESC filed a bankruptcy petition when it was unable to obtain payments for work on its contract. When MESC filed its bankruptcy petition GD filed a proof of claim as a creditor for less than $20,000.00 in unpaid engineering fees.

In 1998, following the expiration of the 5 year Technical Support Agreement, GD claimed that MESC had not acquired the software necessary to design and build its commercial products. The MESC chapter 7 trustee and the petitioner are presently cooperating in a fraud and breach of contract action against GD. In discovery the MESC chapter 7 trustee has obtained the testimony of several former MESC and GD employees including GD's former president of MESC. The testimony of these individuals includes admissions that none of the sales and marketing forecasts provided to the petitioner accurately reflected MESC's financial condition. The testimony also includes admissions that GD never intended to deliver the software needed by MESC to design and build its product lines.

In the case of MESC's $450 million project, once MESC completed the design of the project (a barge mounted power plant) MESC was not paid for its work and other project participants including Westinghouse Electric Corporation actively worked to exclude first the petitioner and later on MESC from the project.

Westinghouse Electric Corporation served as a subcontractor to GD on the third *Seawolf* contract, supplying the nuclear reactor for the submarine. Westinghouse obtained copies of all of the design details prepared by MESC and supplied them to a Malaysian shipyard that then completed construction of the MESC designed power barges. MESC received no consideration for this technology theft.

These power barges were ultimately deployed in Nigeria and were the barges involved in the Enron *et al* Nigeria power barge criminal proceedings recently concluded by the U.S. Department of Justice and resulted in the conviction of the participating individuals.

Commencement of the False Claims Act Civil Action

When it became clear that GD's refusal to provide MESC with the design software needed to design and manufacture its product line was against GD's financial

interest, the petitioner began to study and inquire into explanations for GD's actions. These investigations revealed the fact that GD had taken several extraordinary steps as it prepared to obtain an award of a third *Seawolf*. GD purged its board of directors of all outsider directors that were not either family members or retired Admirals or Generals. GD hired and promoted a partner from its long time principal outside counsel to both GD and the Crown family insiders, eventually appointing this individual CEO of GD. GD sold its space systems, Cessna aircraft and F-16 businesses and paid a substantial, one-time cash dividend to shareholders consisting of the proceeds of the sale of these businesses.

The petitioner obtained a copy of the proceedings 1995 Senate Hearings. In May 1995 the Senate Armed Services committee conducted hearings into the DOD's request for funding of its BUR recommendation for awarding GD a no-bid contract to construct a third *Seawolf* submarine. Both GD and the Navy described an extensive series of alternatives to maintain two nuclear capable manufacturers of submarines. These considerations included awarding GD submarine maintenance and overhaul work as well as other alternatives to the award of a new submarine manufacturing contract. However, all of the alternatives were measured against GD's shipyard forecasts as submitted to the DOD in September 1992 and not against a GD that was maintaining $1.5 billion of commercial work that GD characterized as being compatible with maintaining submarine shipbuilding skills.

Since the September 1992 forecasts included forecasts for their commercial businesses but nonetheless forecast virtually no results from their commercial sales efforts, the Navy and GD were able to justify the BUR recommendation. James Turner testified for GD. Turner failed to inform the Senate that GD's September 1992 commercial business disclosures to the DOD were inconsistent with GD's December 1992 commercial business disclosures to shareholders and the SEC.

It was immediately apparent to the petitioner that James Turner's statements and testimony to the U.S.

Senate totally contradicted Turner's statements of June 1994 to the petitioner concerning the viability of GD's commercial businesses. Taking actions to ensure the failure of MESC and MESC's $450 million power barge project was essential to GD in light of the Senate Hearings in May and June of 1995 and the successful vote to fund the third *Seawolf* in December 1995.

On the basis of this analysis, the petitioner and counsel prepared petitioner's Material Disclosure Statement and submitted this statement to the U.S. Department of Justice. Shortly thereafter the summons and complaint were filed under seal.

Summary Judgment in Favor of GD

Both the district court and the court of appeals erroneously assumed that since GD "disclosed" its decision to divest its commercial businesses in December 1993, GD's statements to the U.S. Senate in May 1995 were not "false statements," and since the Navy stated that it would have awarded GD the third *Seawolf* irrespective of available commercial work, any false statements about commercial work were not "material."

Both tribunals below failed to consider the undisputed fact that petitioner's allegation of false statements concerned the inconsistencies inherent in GD's statements to the DOD in September 1992 and to shareholders and the SEC in December 1992.

GD's December 1993 "disclosure" of its unsuccessful efforts to establish commercial sales does not overcome the inconsistent disclosures of these efforts to the United States and to shareholders and the SEC in 1992.

As described above in the procedural summary, GD did not comply with petitioner's discovery requests, necessitating an order to compel issued by the district court on September 25, 2002. Despite the granting of this motion to compel, petitioner was never provided with the accountants work papers showing consolidating and consolidated sales forecasts for GD's shipyard operations

justifying the statements set forth in GD's Management Discussion and Analysis for fiscal years 1992 and 1993.

REASONS FOR GRANTING THE WRIT

I. ENTITIES SUBJECT TO THE PROVISIONS OF THE FALSE CLAIMS ACT DO NOT HAVE FIRST AMENDMENT IMMUNITY WHEN THEY CHOOSE TO PROVIDE FALSE AND MISLEADING TESTIMONY TO THE U.S. CONGRESS

A. James Turner's Statement to the Petitioner were True for Purposes of Summary Judgment

Although the district court and court of appeals agreed that the record must be construed in the light most favorable to petitioner, the court of appeals referred to the statements of former GD President James Turner in testimony before the United States Senate as "evidence taken out of context." In fact, since both the district court and the court of appeals have affirmed summary judgment in favor of GD, the only context in which James Turner's statements are relevant and in context is the contrast in James Turner's statements to the Senate and those he made the year prior to his Senate testimony to the petitioner.

Petitioner's Material Disclosure Statement, as filed with the original summons and complaint, described petitioner's conversations with James Turner. As described to the petitioner, Turner vigorously disagreed with GD's decision to divest its commercial businesses because Turner believed that GD's commercial businesses were essential to the long term success of GD as a submarine manufacturer, and because, contrary to what GD told the Navy in September 1992 (and Turner subsequently told the Congress) Turner believed that prior to the year 2000, EB's commercial businesses would achieve sales greater than EB's submarine sales.

Since both the district court and the court of appeals have upheld summary judgment, there are no disputed

facts in the record. Additionally, summary judgment required both the district court and the court of appeals to view the evidence of Turner's statements to petitioner in the light most favorable to the petitioner.

Since, therefore, Turner's statements to the petitioner were true for purposes of upholding summary judgment; Turner provided false testimony to the U.S. Senate. GD's arguments below; that Turner's statements are "opinion testimony" and therefore protected by the First Amendment does not alter the fact that GD's has acknowledged that James Turner presented GD's "party line," and not his opinions, in testimony to the United States Senate.

The district court and the court of appeals erroneously viewed James Turner's May 1995 statements as being truthful, since GD had informed the DOD in December 1993 of the decision to exit commercial businesses. However, Turner was testifying about the justification of the BUR recommendation that was based on GD September 1992 disclosures. Since GD had commercial opportunities in September 1992 and since these opportunities were not disclosed to the DOD in the same fashion as they were disclosed to shareholders and the SEC, both tribunals below erroneously assumed that Turner was testifying about a different time frame.

James Turner informed the Senate that GD had considered each and every alternative to the DOD recommendation to purchase an unneeded submarine from GD and that the DOD recommendation was the most cost effective alternative available to the United States. When asked what GD would do with its submarine shipbuilding facilities if the Senate did not fund the unneeded submarine in the upcoming fiscal year 1996 budget Turner replied "shut it down, walk away, because we would not have anything to do." In contrast, almost precisely one year earlier, in June 1994 Turner informed petitioner that GD shipyards would have approximately $1.5 billion in commercial revenues by 1998 if the commercial businesses were retained.

When viewed in the context of GD's statements to the DOD (in September 1992) and to its shareholders (in their

1992 10K) Turner's statements to the Senate agree with GD's statements to the DOD. Turner's statements to petitioner agree with GD's statements to shareholders in the 1992 10K. However, since Turner's statements to the Senate are inconsistent with those made to the petitioner, the statements to the Senate were false and misleading. These false statements clearly meet the definition of materiality as set forth in *Harrison v. Westinghouse Savannah River Co.* 176 F.3d 776 (4th Cir. 1999) and in *United States ex rel. Berge v. Board of Trustees of the University of Alabama,* 104 F.3d 1453 (4th Cir. 1997).

B. The Fourth Circuit's Decision Upholding Summary Judgment Implies a First Amendment Immunity for False Statements Made to the U.S. Congress

Addressing the issue of Turner's false and misleading statements to the U.S. Senate, therefore, GD argued to both the district court and on appeal that Turner's statements to the Senate if untrue, were "opinions," not given under oath, and protected by the First Amendment from False Claims Act liability. GD justified this assertion of First Amendment privilege citing *IGEN Int'l., Inc. v. Roche Diagnostics GMBH,* 335 F.3d 303 (4th Cir. 2003). GD claims that *IGEN* justifies application of the *Noerr-Pennington* doctrine to those who engage in petitioning activity.

The *Noerr-Pennington* doctrine does grant First Amendment immunity to those engaged in petitioning activity. In *E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.,* 365 U.S. 127(1961) this Court held that the Sherman Act did not prohibit two or more persons from associating together in an attempt to petition the government for changes in laws. In *UMW v. Pennington et al.,* 381 U.S. 637 (1965) this Court amplified *Noerr*, holding concerted efforts to influence public officials as not violating anti-trust laws even thought intended to eliminate competition.

GD' claims immunity to make false and misleading statements under this Court's *Noerr-Pennington* line of cases. This claim is unfounded. In *Noerr,* in *Pennington*

and in *IGEN* a party litigant sought immunity for civil litigation activities, not testimony to the U.S. Congress. GD chose to make false and misleading statements to the DOD in its September 1993 response to the BUR. As a direct result of GD's claim that it could not sustain its shipyard operations without a subsidy the DOD recommended building a submarine that was not within the DOD's force requirements and awarding this submarine to GD on a no-bid basis. Before the DOD could obtain funding for this submarine, Congress needed to appropriate the necessary funds. Prior to any vote on a matter as controversial as a no-bid award of an unneeded submarine the Senate held hearings and inquired into the reasonableness of the BUR. GD was summoned by the Senate to provide testimony to an investigative committee of the Senate. Therefore, GD was not "petitioning" the government; GD was offering testimony at a legislative hearing.

In *Watkins v. United States,* 354 U.S. 178, 187 (1957) this Court affirmed the broad investigative powers of the Congress in holding "it (the investigative power) encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency and waste."

Congress can enforce its broad investigative function either with Congress' common law power of contempt or thru the statutory provisions of 2 U.S.C. § 192.

Additionally, any assertion of a *Noerr-Pennington* based First Amendment immunity to offer false and misleading testimony to the Congress is inconsistent with this Court's holdings in *California Motor Transport Co. et al. v. Trucking Unlimited et al.*, 404 U.S. 513 (1972). In *California Motor Transport* this Court held "it is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport* at 514. In order for GD to assert a *Noerr-*

Pennington right immunizing Turner's false and misleading statements, the asserted *Noerr-Pennington* immunity would override 31 U.S.C. §§ 3129 and 3130. As set forth by this Court in *California Motor Transport*, there is such no First Amendment immunity under *Noerr-Pennington.*

The district court's grant of summary judgment, as affirmed by the court of appeals, establishes a *Noerr-Pennington* right to make false and misleading statements to an investigative committee of the U.S. Senate. Not only does this decision represent a significant departure from this Court's decision in *California Motor Transport*, the decision below conflicts with federal penal code, which, at 18 U.S.C. §§ 1001 and 1003 prohibit making false or misleading statements on any matter within the jurisdiction of the executive, legislative or judicial branch of the United States Government.

In *John Bruce Hubbard v. United States,* 514 U.S. 695 (1995) this Court reversed in part its former holding in *United States v. Bramblett,* 348 U.S. 503 (1955). In *Hubbard* this Court affirmed the view that there is no judicial functions exception to 18 U.S.C. § 1001 stating "Congress could not have intended to leave frauds such as Bramblett's without penalty." *Hubbard* at 702.

C. Since There is no *Noerr-Pennington* First Amendment Privilege to Mislead the Congress This Court Should Exercise its Supervisory Powers and Grant Certiorari

The 1986 Amendments to the False Claims Act were intended to strengthen the Act and provide further oversight over frauds against the federal fisc. Here, a powerful defense contractor has succeeded in creating First Amendment immunity under the False Claims Act to provide "opinion testimony" to Congress during hearings conducted by the Congress prior to approving weapons expenditures of interest to the "opinion givers."

This Court should grant Certiorari in order to correct decisions below that are inconsistent with this Court's *Noerr-Pennington* line of cases and inconsistent with the

Congressional intent of the 1986 Amendments to the False Claims Act.

II. THE DECISIONS BELOW REPRESENT IMPORTANT CONFLICTS WITHIN THE CIRCUITS AS WELL AS WITHIN THE FOURTH CIRCUIT

A. In *Newport News* the Fourth Circuit Overturned the District Court's Finding that the Navy's 1991 Decision to Avoid Spending $73 Million to Maintain Two Submarine Shipyards was "Reluctant and Rational"

The first *Seawolf* submarine was designed by Newport News Shipbuilding ("NNS") as a result of a competitive award of the design contract. GD and NNS then competed to build the initial vessel in a class that was contemplated to eventually include 30 *Seawolf* class submarines. GD successfully bid $726 million and was awarded a contract to build the first *Seawolf*.

In 1991 Congress passed a Defense Appropriations Act, 10 U.S.C. § 2305. In doing so Congress provided the DOD with directives regarding the inclusion of "industrial mobilization" considerations in procurement decisions. The Congress provided considerable authority to the Executive to make and formulate plans for emergency mobilization. See 10 U.S.C. § 4501. The statute and regulation further require the establishment of an approved acquisition strategy for weapons systems involving multiple awards and limiting awards to those that conform to the approved strategy.

The Navy established a *Seawolf* acquisition strategy in 1988 that emphasized the importance of maintaining two nuclear capable shipyards for submarine constriction. Prior to the 1991 enactment of the revised Defense Appropriations Act, Congress enacted the 1991 Defense Authorization Act, Pub.L.No. 101-510, 104 Stat. 1498 (1990). This Act authorized the expenditure of $2 billion on the *Seawolf* program. The House Armed Services Committee Report stated "the Committee expects that the

Navy will proceed with its plan to bring the second submarine builder into the SSN-21 program." H.R. No. 101-665, 101st Cong., 2d Sess. 70 (1990). The Senate Armed Services Committee stated "The Committee believes that competition between two yards in the construction of nuclear-powered attack submarines is important to the Nation and should not be given up absent a clear showing that such action is in the long-term best interests of the United States." S.Rep. No. 101-384, 101st Cong., 2d Sess. 61-62 (1990).

On November 9, 1990 the Navy established an acquisition strategy as required by 10 U.S.C. § 2305. The strategy called for consideration of industrial mobilization. On January 8, 1991 GD and NNS submitted bids of $615 (GD) and $688 (NNS), compared with GD's winning bid of $726 on the first *Seawolf*. Because of GD's ability to avoid one time "start-up" costs in building the second *Seawolf*, any NNS bid below the $726 GD bid on the first *Seawolf* would have justified an industrial mobilization award to NNS. However, the Navy awarded the second *Seawolf* to GD based solely on price.

This decision was challenged by NNS, and on July 31, 1991 the U.S. District Court for the Eastern District of Virginia issued an order enjoining the Navy's award of the second *Seawolf* to GD. *Newport News and Shipbuilding and Drydock Company v. U.S. Navy et al*, 771 F.Supp. 739 (E.D. Va. 1991). The district court concluded that the Navy had failed to follow its acquisition strategy. The district court also held that it was an undisputed fact "that the award of the SSN-22 to Electric Boat effectively foreclosed future competitiveness. In fact, the Government proffered a great deal of evidence to the effect that industrial mobilization now meant a sole source." *Newport News* at 747.

On March 16, 1992 the Fourth Circuit reversed the district court's injunction. *Newport News Shipbuilding and Drydock Company v. U.S. Navy et al.*, 960 F.2d 386 (4th Cir. 1992). The Fourth Circuit followed the reasoning of decisions reached by Courts of Appeal in the First and D.C. Circuits in stating "a disappointed bidder bears a heavy

burden of establishing in court that 'the decision by a government agency either had no rational basis or involved a clear and prejudicial violation of applicable statutes or regulations.'" *Newport News* at 392, quoting from *Ulstein Maritime Ltd. V. United States* 833 F.2d 1052, 1054 (1st Cir. 1987)(which quotes from *Smith & Wesson v. United States,* 782 F.2d 1074, 1078 1986). The Court of Appeals noted that the DOD had reduced the *Seawolf* program to only one ship per year, and stated that the Navy concluded "construction rate of one ship per year was inadequate to sustain production at both shipyards." *Newport News* at 393.

In reversing the district court the court of appeals found the Navy's decision to consider and then reject industrial mobilization "reluctant and rational." *Newport News* at 394. The Navy's reduced *Seawolf* requirement of only one new ship per year, a result of the ending of the Cold War, was stated to be only enough to maintain submarine construction at one shipyard.

Therefore, in 1992 the Fourth Circuit reversed a district court decision that had the effect of maintaining the two shipyard strategy described in both the House and the Senate Committee Reports because the Navy's decision to forego spending an additional $73 million to maintain two nuclear capable submarine shipyards at a time when the Navy anticipated building one new nuclear powered attack submarine per year was "rational."

B. By Affirming the District Court's Grant of Summary Judgment the Fourth Circuit Stated that a 1993 Decision to Spend $1.5 Billion to Maintain Two Submarine Shipyards was Consistent with its 1991 Decision in *Newport News*

Prior to the 1995 award of the third *Seawolf* (SSN-23), the entire program was further contracted by the DOD. This contraction resulted in a projected force structure requirement of no new attack submarines beyond SSN-22 (the second *Seawolf)* until after 1998 when the Navy anticipated introduction of a new, smaller class of attack

submarines (the *Virginia* class). As a result of this reduction in force requirements, in 1992 the Navy sent GD its BUR questionnaire. Within three months of the Fourth Circuit decision in *Newport News* GD informed the DOD that sales of its Electric Boat Division, augmented by its four commercial businesses, would decline from approximately $1.7 billion to $665 million in 1998.

As a result of this representation, the BUR recommended constructing a third *Seawolf* submarine and making a sole source award of this vessel to GD even though the submarine was not needed by the Navy to maintain submarine force requirements.

When the Navy made its BUR recommendation, the justification was industrial mobilization, and particularly maintenance of the two nuclear capable submarine shipyards that the Congress had indicated should be considered as a part of all *Seawolf* procurement. As proposed in 1995, the third *Seawolf* would cost $1.5 billion, or more than twice the cost of the first *Seawolf*. In 1991 the Navy considered and "rationally and reluctantly" rejected maintaining two nuclear capable shipyards at a time rather than spending an incremental $73 million. This "rational and reluctant" decision was made despite the fact that the Navy concluded that its decision included a determination that one new submarine award per year would not be capable of sustaining two nuclear capable manufacturers.

During the 1995 Senate hearings NNS presented evidence that the Navy would save approximately $10 billion by continuing with its existing submarine procurement policy of awarding submarines on the basis of cost competition described by the court of appeal as a "reluctant and rational" decision. Although the Navy and GD argued that the cost of the BUR recommendation would be "less" than $10 billion, there was no disagreement that the cost would be at least equal to the $1.5 billion estimated cost of a submarine not needed in the Navy's force deployment plan.

The Fourth Circuit's *Newport News* decision is inconsistent with its decision below in this case. It cannot be rational for the Navy to forego industrial mobilization

considerations in 1991 that it admits will mean the loss of NNS as a submarine manufacturer because it is rational to avoid spending $73 million for this added flexibility and then justify spending an extra $1.5 billion in 1995 for the same manufacturing flexibility at a time when the Navy has reduced its 10 year new submarine requirements from nine to one or two new submarines.

The egregious disparity between an avoided expense of $73 million in 1991 to maintain two facilities to build at least nine new submarines over ten years, and the expenditure of $1.5 billion in 1995 to maintain two shipyards to manufacture at least two submarines over ten years, cannot lead to the legal conclusion of "rational" decision making. Since this disparity represents a significant cost to the U.S. taxpayer, this court should grant certiorari in order to use this Court's supervisory powers in order to ensure uniformity in the Fourth Circuit's decisions relative to *Seawolf* procurement.

The Fourth Circuit's decision is also inconsistent with the decisions by the First and D.C. Circuits cited by the Fourth Circuit in *Newport News*. Notwithstanding the fact that the Fourth Circuit states that its reversal of the district court was based on a finding that the Navy acted reluctantly but rationally, the Fourth Circuit also held that "in the field of government procurement the courts must be sedulous to heed the admonition that their authority to vacate and to enjoin action that is illegal must be exercised with restraint less the courts fall into the error of supposing that they may revise 'action simply because they happen to think it ill considered.'" *Newport News* at 392.

In its opinion and during oral argument the court of appeals referred to its prior decision in *Newport News* as establishing the circuit's position on the subject of *Seawolf* procurement matters. For the two court of appeals decisions to be consistent, this Court should conclude that the Fourth Circuit has adopted a standard that views the $1.4 billion inconsistency in the Navy's decision making as within the bounds of "rational" executive prerogative not subject to judicial scrutiny.

Since the Fourth Circuit's decisions in the case below and in *Newport News* constitutes an erroneous application of the circuit's own "rational" decision test, the Fourth Circuit's decision in *Newport News* and below in this *qui tam* action is actually a "sedulous heeding of the admonition" to simply refuse to apply judicial scrutiny to any executive or legislative procurement decision.

C. Since the Decisions Below are Incompatible within the Circuit and Since these Decisions Represent an Important Conflict between the Circuits, this Court Should Grant Certiorari to Resolve the Conflicts

This Court should grant Certiorari in order to correct the decisions of the court of appeals and ensure their uniformity both within the circuit and with other circuits, including the First Circuit and the D.C. Circuit, that have issued opinions on the subject of judicial review of executive decision making in the area of procurement.

III. THE DECISION BELOW FAILED TO RECOGNIZE FALSE CERTIFICATION LIABILITY UNDER THE FALSE CLAIMS ACT AND DISREGARDED THE CONGRESSIONAL INTENT OF THE FALSE CLAIMS ACT

A. The Decision Below Eviscerates the Congressional Intent of the False Claims Act

This False Claims Act claim was originally filed in May 1999 and, following a decision to not intervene by the United States the complaint was unsealed in December 2000. In the time since the filing of the complaint U.S. financial markets have endured the effects of corporate malfeasance exemplified by the Enron bankruptcy. The Congress passed Sarbanes-Oxley in order to provide reassurance to the financial markets. Enforcement of the False Claims Act assists in achieving the objectives of Sarbanes-Oxley.

Prior to selling MESC, GD developed proprietary design software for power barges. This technology utilizes acoustical design software developed by GD and the Navy to help design "quiet" submarines. GD's sale of MESC was intended to provide MESC the opportunity to use this software and re-employ laid-off shipyard workers. Instead, MESC's design drawings were stolen, taken to Malaysia and ended up in power barges that became a part of the Enron/Anderson & Co. fraud.

Enron and similar examples of failures in corporate governance and oversight placed U.S. financial markets in the decline that marked the beginning of the 21st Century. GD continues to exist in a pre-Sarbanes-Oxley protective cocoon. Anderson & Co. were GD's auditors until their demise. In discovery below, GD and Anderson & Co. refused to provide accountant's work-papers justifying the forecasts in GD's 1992 Report to Shareholders on Form 10-K.

GD defends allegations of violating the False Claims Act by claiming that the inconsistencies between the commercial forecasts prepared by GD for shareholders and for the DOD may constitute securities fraud but not False Claims Act violations.

When GD needed to chose between providing consistent answers in the breach of contract action commenced by MESC's chapter 7 trustee and the False Claims Act proceeding below, GD chose to admit facts in the MESC adversary proceeding that constitute breach of contract and fraud. GD's arguments to the court of appeals below include the argument that neither securities fraud nor fraud against MESC is a violation of the False Claims Act.

The case below represents by far the largest False Claims Act civil action in the history of the statute. Despite assurances provided to the U.S. in 1995 by James Turner, the three *Seawolf* submarines will end up costing the United States between $15 and $20 billion rather than the $3 billion described by Turner in 1995.

The case below also represents the most senior "relator," or whistleblower to come forward pursuant to the

financial encouragement provided by the Congress since the passage of the first *qui tam* statute at the request of President Lincoln. In this case the relator was not an "insider-employee" but a sophisticated and experienced financial entrepreneur. *Qui tam* is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur,* or "who pursues this action on our Lord the King's behalf as well as his own."

This Court has characterized the False Claims Act stating "the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Niefert White Company,* 390 U.S. 228, 232 (1968), see also *Rainwater v. United States,* 356 U.S. 590, 592 (1958)("it seems quite clear that the objective of Congress (in the FCA) was broadly to protect the funds and property of the Government from fraudulent claims").

Petitioner's Request for Rehearing and Rehearing *En Banc* set forth a compelling description of the facts and evidence overlooked by both the trial court and the court of appeals. Although errors of fact or law are generally not proper stand-alone justifications for granting Certiorari, in this case vindication of the Congressional Intent of both the False Claims Act and Sarbanes-Oxley justify granting Certiorari.

GD's September 1992 response to the DOD claimed that sales of GD's Electric Boat Division would decline from 1992 sales of $1.5 billion to 1998 sales of $665 million despite the inclusion of all of GD's commercial businesses in this forecast. Both the district court and the court of appeals have held this representation to be fair and accurate and both tribunals have held that James Turner's 1995 Senate testimony fairly reported these facts.

Assuming the truth of these findings, then GD's December 1992 Report to Shareholders on Form 10-K could not have complied with SEC reporting requirements for financial statements in annual reports to shareholders of public companies. In December 1992 GD's Electric Boat Division was one of only two major business units. Electric Boat represented over 50% of GD's sales and earnings, and,

according to the disclosures made by GD to the DOD in September 1992 GD's Electric Boat Division would experience a sales decrease to a level at which GD claimed Electric Boat would not be a going concern.

Ironically, GD's only other major business in 1993 and 1994 was its tank manufacturing business. In the late 1970's and early 1980's when Chrysler Corporation requested financial assistance from the United States in order to avoid bankruptcy, the United States demanded and received significant financial disclosure from Chrysler. The United States also required Chrysler to sell its tank manufacturing business to a financially viable entity. GD was the successful bidder for Chrysler's tank business.

The decisions below have affirmed the fact that GD was in dire financial circumstances which were never disclosed to shareholders. According to the evidence presented to the district court by petitioner, GD was contemplating winding up its business and distributing all of the funds to shareholders prior to the DOD decision to fund the third *Seawolf*. Given the United States' concern with maintaining vital defense assets in financially secure hands, issues surrounding GD's failure to make timely and full disclosure to shareholders and the SEC violated both SEC Rules and Statutes as well as the procurement policies and understandings of the United States.

In his May 1995 Senate testimony James Turner confirmed the fact that Electric Boat was not financially viable without receipt of a substantial government subsidy in his 1995 Senate Testimony. Responding to a question from Senator Joseph Lieberman about GD intentions for GD's submarine shipyards should the Congress not fund the BUR recommended third *Seawolf* Turner said "we are going to close it at the end of the first quarter of next year, close, walk away, gone."

If GD in fact would have closed down its Electric Boat Division absent approval of funding for the third *Seawolf*, GD never disclosed this fact to its shareholders or to the SEC. This news would require a filing on SEC Form 8-K for a "material development." This filing should have informed shareholders that GD would not be a going

concern without approval of the funding for the third *Seawolf*.

GD argued below that "of course, even if GD had lied to its shareholders (which it certainly did not), that is not a violation of the False Claims Act... the same is true if GD had lied to Gilliam to induce him to buy MESC (which it also certainly did not do). Both the Navy and the Congress were told the truth, and that is all that matters under the Act."

The undisputed evidence demonstrates that GD has a long history of keeping "two sets of books," and threatening and intimidating those that question its dealings with the United States Navy. The undisputed evidence in the *MESC v. GD* fraud action shows that GD defrauded MESC. Despite being compelled, GD did not cooperate in discovery below, refusing to produce accountant work papers dealing with the "two sets of books" issue.

GD turned off the heat on GAO auditors, and accused the father of the nuclear Navy of accepting illegal gratuities when he accused GD of making false claims. By passing and, in 1986 amending the False Claims Act Congress intended to facilitate was vigorous prosecution of government contractor fraud.

In the case below the intent of Congress has not been well served and this Court should therefore grant Certiorari and exercise its supervisory powers and ensure enforcement of the False Claims Act

B. By Affirming the District Court's Decision the Court of Appeals has Denied False Claims Act Liability for False Certifications

The district court decision affirming summary judgment in favor of GD assumes that GD did not make false statements to the United States in their September 1992 responses to the DOD's BUR questionnaire. Therefore GD's disclosures to shareholders in the 1992 10-K could not be correct and did not satisfy the disclosure requirements of the securities laws. Petitioner argued below that either GD made false statements to the DOD or it made false statements to shareholders and the SEC.

GD admits, in its appellee brief below, that the Navy had the right to monitor GD's financial statements and reports and therefore GD's compliance with the federal securities laws was an affirmative covenant in all of their government contracts. By making false statements to the SEC GD violated the False Claims Act by making a "false certification."

A "false certification" theory False Claims Act liability is predicated on false certification of compliance with a federal statute, regulation or contractual term that is a prerequisite to obtaining a government benefit. The Fifth Circuit has identified two elements necessary to state a false certification case of action: 1) the defendant makes a knowingly false certification of compliance with a statute or regulation; and 2) the certification is a prerequisite to payment. *United States v. Southland Management Corp.*, 288 F.3d 665, 679 (5th Cir. 2002).

Both the Fifth and the Fourth Circuits have stated in *dicta* that they might not recognize an "implied certification theory" as contrasted with a "express certification theory," although the Fifth Circuit adopted a "limited" implied certification theory in *U.S. ex rel. Thompson v. Columbia Healthcare Corp.*, 125 F.3d 899 (5th cir. 1997) ("where the government has conditioned payment of a claim upon a claimant's certification of compliance with, for example, a statute or regulation, a claimant submits a false or fraudulent claim when he or she falsely certifies compliance with that statute or regulation").

The Fourth Circuits more limited view of implied certification is found in *U.S. v. Southland* at 679, *Harrison v. Westinghouse, supra* at n8, quoting from *United States ex rel. Joslin v. Community Home Health of Maryland, Inc.*, 984 F.Supp. 374, 384-385 (D. Md. 1997) ("holding, in part, that there can be no False Claims Act liability for an omission without an obligation to disclose, also makes questionable an implied certification claim in the Fourth Circuit. We need not address the validity and problems of an implied certification theory of liability here").

In contrast, the Federal Circuit has adopted the implied certification theory of FCA liability. See *Ab-Tech*

Construction, Inc. v. United States, 31 Fed.Cl. 429 (Fed.Cl. 1994). The Second circuit declined to follow *Ab-Tech* in *Mikes v. Straus,* 274 F.3d 687 (2nd Cir. 2001).

In this case the court of appeals has refused to recognize either express or implied false certification False Claims Act liability. The Fifth and D.C. Circuits recognize false certification liability as committed by GD. GD was required to maintain compliance with the disclosure and reporting requirements of the securities laws as a condition to obtaining new contracts and staying out of default on existing contracts. GD's December 1992 statements to shareholders were far more optimistic than GD's September 1992 statements to the DOD. When GD failed to disclose to shareholders and the SEC that Electric Boat, representing more than 50% of GD's sales and earnings, would be "shut down, walk away" without a government subsidy, GD violated the securities laws.

Since the Fourth circuit does not recognize false certification liability for acts constituting securities fraud, the Fourth Circuit's decision below represents an important conflict within the Circuits justifying the exercise of this Court's supervisory powers.

C. Since the Fourth Circuits Decision Eviscerates Congressional Intent and Represents an Important Conflict within the Circuits, this Court should Grant Certiorari to Restore Congressional Intent and Resolve the Inter-Circuit Conflicts

GD did not stop playing fast and loose with the securities laws when it was successful in obtaining the contract for the third *Seawolf.* GD filed its motion to dismiss in the district court, characterizing the False Claims Act complaint as "frivolous." When the district court denied GD's November 2001 motion to dismiss no disclosures were made to shareholders.

When GD failed to answer the complaint and default was entered by the clerk of Court (on February 12, 2002) GD waited for the release of its 2001 10-K in late March

2002 to disclose the existence of the action, but not its default, which was not set aside until April 10, 2002.

GD defrauded MESC and allowed MESC's proprietary design software to be stolen and used as a part of the Enron/Nigeria fraud.

In light of the facts described in this petition, this Court should use its supervisory powers in order to protect the Congressional Intent of the False Claims Act.

In light of the split of authority in the Circuits over the issue of false certifications this Court should exercise its supervisory powers and ensure uniformity within the circuits on the issue of false certification liability under the False Claims Act.

CONCLUSION

For all of the reasons set forth above petitioner respectfully requests that this Court grant Certiorari.

Respectfully submitted

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

United States ex rel. William J Gilliam, Plaintiff,	)	C/A No. 2:01-3023-18
v.	)	**ORDER**
General Dynamics Corporation, Defendant.	)	

This matter comes before the court on defendant's Motion to Dismiss plaintiff's False Claims Act cause of action. The court heard oral arguments on October 24, 2001.

I. Background

Defendant General Dynamics Corporation's Electric Boat Division builds nuclear submarines for the Navy. At the end of the Cold War, the Navy recognized that there would be a dramatic reduction in the production of nuclear submarines. It further determined that, in case of renewed future defense needs, it would be necessary to maintain two shipyards that could produce nuclear submarines. The Navy also determined that, because of the complexity of the nuclear submarine design, once a shipyard ceases to produce nuclear submarines, it is almost impossible for the

shipyard to become operational again.

The issue in this case is production of the third "Seawolf" submarine. Defendant informed the Navy that unless it was awarded the Seawolf contract without having to go through the competitive bidding process, its Electric Boat Division would not survive. Plaintiff claims that defendant made false statements to the Navy and other government officials concerning its financial situation and its need to receive the Seawolf contract without competitive bidding. Plaintiff claims that defendant had developed commercial alternatives that would have kept Electric Boat in business even without the Seawolf contract. Plaintiff claims that the Navy based its decision to award defendant the Seawolf contract on the allegedly false information.

II. Legal Standard

The purpose of a 12(b)(6) motion is to test the sufficiency of the Complaint, not to decide the merits of the action. See Edwards v. City of Goldsboro, 178 F.3d 231, 243-44. At this stage of the litigation, the plaintiffs well pleaded allegations are taken as true and the Complaint, including all reasonable inferences, is liberally construed in her or his favor. See McNair v. Lend Lease Trucks. Inc., *95* F.3d 325, 327 (4th Cir. 1996).

Dismissal under Rule 12(b)(6) is generally regarded as appropriate only "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Generally, the court looks only to the Complaint itself to ascertain the propriety of a motion to dismiss. See Colleton Reg'l Hosp. v. MRS Medical Review Sys., Inc., 866 F.Supp. 891, 893 (D.S.C. 1994). A court may also consider documents attached to the Complaint and documents incorporated into the Complaint by reference. See Phillips v. LCI Int'l, Inc., 190 F.3d 609, 618 (4th Cir. 1999). A plaintiff need not plead

detailed evidentiary facts, and a Complaint is sufficient if it will give a defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. See Bolding v. Holshouser, 575 F.2d 461, 464 (4th Cir. 1978). Nonetheless, the court cannot ignore a clear failure in the pleadings to allege any facts that set forth a claim, nor can the court assume the existence of a genuine issue of material fact where none exists. See Migdal v. Rowe Price-FlemingInt'l, Inc., 248 F.3d 321, 325 (4th Cir. 2001) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

III. Legal Analysis

At issue in this case is whether defendant made materially false statements to the Navy in order to secure a nuclear submarine contract without going through the competitive bidding process. The False Claims Act allows a private litigant to bring suit, on behalf of the government, against anyone who:

(1)knowingly presents, or causes to be presented, to an officer or employee of the United States Government. . ., a false or fraudulent claim for payment or approval;
(2)knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; [or]
(3)conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.

31 U.S.C.A. § 3729(a) (West 2001); 31 U.S.C.A. § 3730(b) (West 2001). Based on these provisions, the Fourth Circuit has found that the "test for False Claims Act liability. . . is (1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a 'claim')." Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999).

In this case, defendant claims that plaintiff failed to establish a cause of action under the False Claims Act because (1) he failed to show that the allegedly false statements were material to the Navy's decision to award defendant the submarine contract; (2) the Complaint does not allege any false statements or other allegedly fraudulent conduct with particularity as required by Federal Rule of Civil Procedure 9(b); and (3) this court lacks subject matter jurisdiction over plaintiff's claim pursuant to 31 U.S.C. § 3730(e)(4). (Defendant's Memo. in Supp. of Motion to Dismiss at 3-5).

A. Materiality

In order to be actionable under the False Claims Act, the false statement must be material. The issue of materiality is decided as a matter of law by the court. See United States ex rel. Berge v. Hoard of Trustees of the University of Alabama, 104 F.3d 1453, 1460 (4th Cir. 1997). "[T]he materiality of the false statement turns on 'whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action.'" Id. (quoting United States v. Norris, 749 F.2d 1116, 1122 (4th Cir. 1984)).

As set forth in the Complaint, the following representations made by defendant were allegedly false:

1. That the nuclear submarine industrial base would be at great risk;
2. Reconstitution of the submarine industrial base might be impossible;
3. Corporate-owned waterfront property would be converted to uses other than shipbuilding;
4. Skilled labor for nuclear submarines would be lost;
5. Premature competition would risk permanent loss of Electric Boat;
6. Mandating competition in submarine construction

would in fact eliminate future competition, and

7. The "two yard" (i.e., two shipyards) strategy was the only way to ensure competition for submarine construction in the future.

(Complaint ¶ 8(a)-(g)). Plaintiff contends that these statements were false because defendant had developed commercial alternatives that utilized the skills of Electric Boat's shipyard during the slowdown of military construction, and therefore the skilled workforce needed to build nuclear submarines would be preserved even if defendant were not awarded the submarine contract. (Complaint ¶ 8(h), (i)).

Defendant argues that any statements relating to its commercial ventures were not material to the Navy's decision because these commercial ventures were not capable of maintaining defendant's ability to produce nuclear submarines. (Defendant's Memo. in Supp. of Motion to Dismiss at 3, 12-13). Defendant claims that the Navy was not concerned about Electric Boat's commercial viability but was concerned only about its continued ability to produce nuclear submarines. (Defendant's Memo. in Supp. of Motion to Dismiss at 3-4).

Looking solely at the Complaint, plaintiff has established a claim under the False Claims Act. In his Complaint, plaintiff alleged that defendant intentionally made false statements to the Navy and other government officials. (Complaint ¶¶ 5, 6, 9). Plaintiff stated that the essence of these false statements was that Electric Boat would go out of business if defendant was not awarded the submarine contract. (Complaint ¶ 7). Plaintiff also alleged that the Navy based its decision to award the contract to defendant without competitive bidding on these allegedly false statements. (Complaint ¶ 5). Further, plaintiff alleged that defendant's statements were false because defendant had developed commercial alternatives that would have kept

Electric Boat in business during the anticipated slowdown in submarine construction orders. (Complaint ¶ 7). As a result of the allegedly false statements, plaintiff claimed that the Navy accelerated its submarine building program and spent four billion dollars that did not need to be spent. (Complaint ¶ 7). Finally, plaintiff asserted that defendant submitted false claims to the United States. (Complaint ¶ 10). At this stage in the litigation, where plaintiffs well pleaded allegations are taken as true and the Complaint is construed liberally in plaintiffs favor, plaintiffs Complaint states a cause of action under the False Claims Act.

B. Rule 9(b)

Under Rule 9(b) plaintiff is required to plead fraud with particularity. See Fed. R. Civ. P. 9(b). In Harrison, the Fourth Circuit found that "circumstances required to be pled with particularity under Rule 9(b) are the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." 176 F.3d at 784 (internal citations omitted). The court found that the "'clear intent of Rule 9(b) is to eliminate fraud actions in which all the facts are learned through discovery after the complaint is filed.'" Id. at 789 (quoting United States ex rel. Stinson, Lyons, Gerlin & Bustarnante, P.A. v. Blue Cross Blue Shield, 755 F.Supp. 1040, 1052 (S.D. Ga. 1990)).

In this case, the Complaint states when the allegedly false statements were made, (Complaint ¶ 5), who made the statements, (Complaint ¶ 5), who the statements were made to, (Complaint ¶¶ 5, 6), and what the allegedly false statements were. (Complaint ¶ 8). Plaintiff's Complaint was pleaded with sufficient particularity to meet the requirements under Rule 9(b).

C. Subject Matter Jurisdiction

A claim under the False Claims Act cannot be based on publicly disclosed information. Although Congress wanted to encourage private citizens to help fight fraud against the government, "Congress sought to prevent 'parasitic' qui tam actions in which relators, rather than bringing to light independently discovered information of fraud, simply feed off of previous disclosures of government fraud." United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1347 (4th Cir. 1994). As a result, the False Claims Act provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless. . . the person bringing the action is an original source of the information.

31 U.S.C.A. § 3730(e)(4)(A) (West 2001). A person is an original source if he or she has "direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing [suit]." 31 U.S.C.A. § 3730(e)(4)(B) (West 2001).

Defendant claims that plaintiff cannot be an original source of the information that defendant was pursuing other commercial alternatives because this information was publicly available long before plaintiff would even have known about it. (Defendant's Memo. in Supp. of Motion to Dismiss at 2 1-22). Defendant contends that plaintiffs exposure to this information "was entirely through public documents." (Defendant's Memo. in Supp. of Motion to Dismiss at 23). Plaintiff, however, claims that the pertinent information is not only that defendant had other commercial opportunities but that these commercial alternatives were sufficient to keep Electric Boat from

going out of business. Plaintiff states: "What Gilliam knows that no one else knew was the value of the commercial options that GD had developed and about which Turner testified. .. (Plaintiffs Memo. in Opp. at 31). Plaintiff noted that "[t]he valuation information came from Turner himself, in his private meetings with Gilliam, and through the confidential disclosures made via the Goldman Sachs information." (Plaintiffs Memo. in Opp. at 31). At this early stage of the litigation, this information is sufficient to show that plaintiff was an original source of information as to the value of the commercial alternatives and the ability of these venture to keep Electric Boat's shipyard operational. This court, therefore, has subject matter jurisdiction over the claim.

IV. Conclusion

Of central importance in this litigation is whether the allegedly false statements made by defendant were material to the Navy's decision to award it the nuclear submarine contract without competitive bidding. Although plaintiffs allegations are sufficient to state a claim under the liberal notice requirements, plaintiff will now be required to present evidence to support his allegations that the allegedly false statements were material to the Navy's decision. Specifically, plaintiff will be required to show that the commercial activities of Electric Boat could maintain the skills and workforce needed to produce nuclear submarines.

For the reasons set forth above, it is therefore, **ORDERED** that defendant's Motion to Dismiss be **DENIED**, without prejudice.

IT IS FURTHER ORDERED that the parties have ninety days to conduct discovery as to the materiality of the allegedly false statements made by defendant.

IT IS FURTHER ORDERED that the parties submit any

Motions for Summary Judgment with regard to materiality by March 15, 2002.

AND IT IS SO ORDERED.

_____

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

November_____, 2001
Charleston, South Carolina

FILED

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

OCT 16, 2002
LARRY W. PROPES, CLERK
CHARLESTON, SC

WILLIAM GILLIAM,

Plaintiff,

vs.

SUMMARY JUDGMENT
IN A CIVIL CASE
Civil Action No. 2:01cv3023-12

GENERAL DYNAMICS,

Defendant.

Decision by the Court. This matter came before the court for hearing on motion of the defendant for summary judgment. The court has heard the issues and a decision has been rendered granting the motion of the defendant for summary judgment,

IT IS ORDERED AND ADJUDGED that summary judgment is hereby entered as to the defendant GENERAL DYNAMICS and this case is hereby dismissed.

APPROVED BY:

_____

C.WESTON HOUCK
UNITED STATES DISTRICT JUDGE

October 16, 2002

LARRY W. PROPES, CLERK
UNITED STATES DISTRICT COURT

_____

Deputy Clerk

11:26 pm

JUDGMENT

FILED: July 12, 2004

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

FILED
SEP 20 2004
LARRY W. PROPES, CLERK
CHARLESTON, SC

NO. 03-1912
CA-01-3023-12-2

UNITED STATES EX REL WILLIAM J. GILLIAM

Plaintiff - Appellant

V.

GENERAL DYNAMICS CORPORATION

Defendant - Appellee

and

UNITED STATES OF AMERICA

Party in Interest

Appeal from the United States District Court for the
District of South Carolina at Charleston

In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor

CLERK

A True Copy, Teste:
Patricia S. Connor, Clerk
BY_____
Deputy Clerk

UNITED STATES ex rel. WILLIAM J. GILLIAM, Plaintiff-Appellant, v. GENERAL DYNAMICS CORPORATION, Defendant-Appellee, and UNITED STATES OF AMERICA, Party in Interest.

No. 03-1912

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2004 U.S. App. LEXIS 14261

May 7, 2004, Argued
July 12, 2004, Decided

NOTICE: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the District of South Carolina, at Charleston. (CA-01-3023-12-2). C. Weston Houck, Senior District Judge.

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

COUNSEL: ARGUED: Gregg Meyers, Charleston, South Carolina, for Appellant.

Richard Thomas Franch, JENNER & BLOCK, Chicago, Illinois, for Appellee.

ON BRIEF: Lawrence S. Schaner, John T. Ruskusky, JENNER & BLOCK, Chicago, Illinois, for Appellee.

JUDGES: Before NIEMEYER, MICHAEL, and TRAXLER, Circuit Judges.

OPINION: PER CURIAM:

The district court granted summary judgment to the defendant, General Dynamics Corporation, in this qui tam suit brought by William J. Gilliam under the False Claims Act, *31 U.S.C. § 3729 et seq.* We affirm.

General Dynamics is a defense supplier with a division called Electric Boat. Electric Boat is one of only two nuclear capable shipbuilders in the country (the other is Newport News Shipbuilding and Dry Dock Company). In the 1980s and 1990s, Electric Boat was awarded the contracts for all three Seawolf [*2] class nuclear attack submarines. Part of the history of the Seawolf is set forth in *Newport News Shipbuilding & Dry Dock Co. v. General Dynamics Corp., 960 F.2d 386 (4th Cir. 1992)*. For our purposes, it suffices to explain that Congress scaled back the number of Seawolf submarines it planned to authorize after the end of the Cold War. Congress engaged in considerable debate over whether to authorize the final Seawolf, the SSN-23. The proponents of the SSN-23 argued that building the sub was necessary in order to maintain the country's industrial capacity to build nuclear submarines, which required two nuclear capable shipyards, until the next class of nuclear submarines was authorized. Congress eventually authorized the SSN-23, and the contract was sole-sourced to Electric Boat. Gilliam brought this suit on behalf of the United States under the False Claims Act, alleging that General Dynamics's Electric Boat

division made false statements that induced the United States to award the SSN-23 contract to Electric Boat without competitive bidding. The district court granted summary judgment to General Dynamics.

The elements of a False Claims Act claim are: (1) "a false [*3] statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due." *Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999)*. Materiality in a civil False Claims Act case is a "mixed question of law and fact." *Id. at 785*. Gilliam alleges only that the decision to *sole-source* the SSN-23 was prompted by Electric Boat's misrepresentations. He does not allege that Electric Boat made any misrepresentations inducing Congress to authorize construction of the final Seawolf. Gilliam's theory is that Electric Boat lied to the government by saying it would go out of business unless it received the SSN-23 contract without competitive bidding. Alternatively, he argues that Electric Boat should have informed Congress that it had, but chose not to pursue, potentially lucrative commercial opportunities that would have kept the company afloat without the SSN-23. The United States was damaged, Gilliam's theory goes, because it paid more for the SSN-23 than it would have if the contract had been competitively bid. [*4] Gilliam says that bidding the SSN-23 would have kept Electric Boat honest and held down the cost of the SSN-23, even though the record indicates that Newport News would not have been price competitive with Electric Boat.

We review the grant of summary judgment de novo. *Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 817 (4th Cir. 1995)*. Assuming for the sake of argument that Gilliam's theory would be actionable under the False Claims Act, we conclude that there is no genuine issue of material fact on the false statement or materiality elements and that General Dynamics is therefore entitled to summary judgment. *See id.*

There is no evidence to support Gilliam's argument that Electric Boat told the government it would shut down if it was merely forced to submit a bid for the SSN-23. Electric Boat's president, Jim Turner, did tell Congress that "premature competition will drive up costs unnecessarily and risk permanent loss of Electric Boat," but he was referring only to the competition scheme the government was considering for the next class of nuclear attack submarines, not the SSN-23. J.A. 347. Although we construe the evidence in the light most favorable to [*5] the non-moving party at summary judgment, we do not take evidence out of context. *Sylvia Dev. Corp., 48 F.3d at 821-22.* A factfinder simply could not construe Turner's statement as saying anything false about competition for the SSN-23. *See id. at 822.*

Gilliam's alternative argument (that Electric Boat should have disclosed that it chose not to pursue commercial opportunities, prompting the government to sole-source the SSN-23 to Electric Boat) fares no better. Again, there is no genuine issue of material fact on the false statement element because Electric Boat did disclose both to Congress and the Navy that it considered commercial opportunities, but had abandoned them. Furthermore, there is no evidence that any lack of disclosure was material to the decision to sole-source the SSN-23 to Electric Boat. Assuming Electric Boat's foregone business opportunities would have been as lucrative as Gilliam claims, they at most indicate that Electric Boat could have survived as a commercial entity without the SSN-23 contract. The evidence in the record, however, indicates that the government was interested in maintaining nuclear shipyard capacity. No evidence [*6] indicates that the commercial opportunities would have preserved Electric Boat's capacity to build nuclear ships. Thus, Electric Boat's failure to disclose its foregone commercial opportunities could not have been material to the decision to sole-source the SSN-23. For the foregoing reasons, the judgment of the district court is *AFFIRMED.*

Title 2 § 192. Refusal of witness to testify or produce papers

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

Title 10 USC § 2305 . Contracts: planning, solicitation, evaluation, and award procedures.

(a)

(1)

(A) In preparing for the procurement of property or services, the head of an agency shall—

(i) specify the agency's needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement;

(ii) use advance procurement planning and market research; and

(iii) develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired.

(B) Each solicitation under this chapter shall include specifications which—

(i) consistent with the provisions of this chapter,

permit full and open competition; and
(ii) include restrictive provisions or conditions only to the extent necessary to satisfy the needs of the agency or as authorized by law.
(C) For the purposes of subparagraphs (A) and (B), the type of specification included in a solicitation shall depend on the nature of the needs of the agency and the market available to satisfy such needs. Subject to such needs, specifications may be stated in terms of—
(i) function, so that a variety of products or services may qualify;
(ii) performance, including specifications of the range of acceptable characteristics or of the minimum acceptable standards; or
(iii) design requirements.
(2) In addition to the specifications described in paragraph (1), a solicitation for sealed bids or competitive proposals (other than for a procurement for commercial items using special simplified procedures or a purchase for an amount not greater than the simplified acquisition threshold) shall at a minimum include—
(A) a statement of—
(i) all significant factors and significant subfactors which the head of the agency reasonably expects to consider in evaluating sealed bids (including price) or competitive proposals (including cost or price, cost-related or price-related factors and subfactors, and noncost-related or nonprice-related factors and subfactors); and
(ii) the relative importance assigned to each of those factors and subfactors; and
(B)
(i) in the case of sealed bids—
(I) a statement that sealed bids will be evaluated without discussions with the bidders; and
(II) the time and place for the opening of the sealed

bids; or
(ii) in the case of competitive proposals—
(I) either a statement that the proposals are intended to be evaluated with, and award made after, discussions with the offerors, or a statement that the proposals are intended to be evaluated, and award made, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) unless discussions are determined to be necessary; and
(II) the time and place for submission of proposals.
(3)
(A) In prescribing the evaluation factors to be included in each solicitation for competitive proposals, the head of an agency—
(i) shall clearly establish the relative importance assigned to the evaluation factors and subfactors, including the quality of the product or services to be provided (including technical capability, management capability, prior experience, and past performance of the offeror);
(ii) shall include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals; and
(iii) shall disclose to offerors whether all evaluation factors other than cost or price, when combined, are—
(I) significantly more important than cost or price;
(II) approximately equal in importance to cost or price; or
(III) significantly less important than cost or price.
(B) The regulations implementing clause (iii) of subparagraph (A) may not define the terms "significantly more important" and "significantly less important" as specific numeric weights that would be applied uniformly to all solicitations or a class of solicitations.
(4) Nothing in this subsection prohibits an agency

from—

(A) providing additional information in a solicitation, including numeric weights for all evaluation factors and subfactors on a case-by-case basis; or

(B) stating in a solicitation that award will be made to the offeror that meets the solicitation's mandatory requirements at the lowest cost or price.

(5) The head of an agency, in issuing a solicitation for a contract to be awarded using sealed bid procedures, may not include in such solicitation a clause providing for the evaluation of prices for options to purchase additional property or services under the contract unless the head of the agency has determined that there is a reasonable likelihood that the options will be exercised.

(b)

(1) The head of an agency shall evaluate sealed bids and competitive proposals and make an award based solely on the factors specified in the solicitation.

(2) All sealed bids or competitive proposals received in response to a solicitation may be rejected if the head of the agency determines that such action is in the public interest.

(3) Sealed bids shall be opened publicly at the time and place stated in the solicitation. The head of the agency shall evaluate the bids in accordance with paragraph (1) without discussions with the bidders and, except as provided in paragraph (2), shall award a contract with reasonable promptness to the responsible bidder whose bid conforms to the solicitation and is most advantageous to the United States, considering only price and the other price-related factors included in the solicitation. The award of a contract shall be made by transmitting, in writing or by electronic means, notice of the award to the successful bidder. Within three days after the date of contract award, the head of the agency shall notify, in

writing or by electronic means, each bidder not awarded the contract that the contract has been awarded.

(4)

(A) The head of an agency shall evaluate competitive proposals in accordance with paragraph (1) and may award a contract—

(i) after discussions with the offerors, provided that written or oral discussions have been conducted with all responsible offerors who submit proposals within the competitive range; or

(ii) based on the proposals received, without discussions with the offerors (other than discussions conducted for the purpose of minor clarification) provided that the solicitation included a statement that proposals are intended to be evaluated, and award made, without discussions, unless discussions are determined to be necessary.

(B) If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under subparagraph (A)(i) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of proposals in the competitive range, in accordance with the criteria specified in the solicitation, to the greatest number that will permit an efficient competition among the offerors rated most highly in accordance with such criteria.

(C) Except as provided in paragraph (2), the head of the agency shall award a contract with reasonable promptness to the responsible source whose proposal is most advantageous to the United States, considering only cost or price and the other factors included in the solicitation. The head of the agency shall award the contract by transmitting, in writing or by electronic means, notice of the award to such source and, within three days after the date of contract

award, shall notify, in writing or by electronic means, all other offerors of the rejection of their proposals. This subparagraph does not apply with respect to the award of a contract for the acquisition of perishable subsistence items.

(5)

(A) When a contract is awarded by the head of an agency on the basis of competitive proposals, an unsuccessful offeror, upon written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall be debriefed and furnished the basis for the selection decision and contract award. The head of the agency shall debrief the offeror within, to the maximum extent practicable, five days after receipt of the request by the agency.

(B) The debriefing shall include, at a minimum—

(i) the agency's evaluation of the significant weak or deficient factors in the offeror's offer;

(ii) the overall evaluated cost and technical rating of the offer of the contractor awarded the contract and the overall evaluated cost and technical rating of the offer of the debriefed offeror;

(iii) the overall ranking of all offers;

(iv) a summary of the rationale for the award;

(v) in the case of a proposal that includes a commercial item that is an end item under the contract, the make and model of the item being provided in accordance with the offer of the contractor awarded the contract; and

(vi) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the agency.

(C) The debriefing may not include point-by-point comparisons of the debriefed offeror's offer with other

offers and may not disclose any information that is exempt from disclosure under section 552 (b) of title 5.
(D) Each solicitation for competitive proposals shall include a statement that information described in subparagraph (B) may be disclosed in post-award debriefings.
(E) If, within one year after the date of the contract award and as a result of a successful procurement protest, the agency seeks to fulfill the requirement under the protested contract either on the basis of a new solicitation of offers or on the basis of new best and final offers requested for that contract, the agency shall make available to all offerors—
(i) the information provided in debriefings under this paragraph regarding the offer of the contractor awarded the contract; and
(ii) the same information that would have been provided to the original offerors.
(6)
(A) When the contracting officer excludes an offeror submitting a competitive proposal from the competitive range (or otherwise excludes such an offeror from further consideration prior to the final source selection decision), the excluded offeror may request in writing, within three days after the date on which the excluded offeror receives notice of its exclusion, a debriefing prior to award. The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable but may refuse the request for a debriefing if it is not in the best interests of the Government to conduct a debriefing at that time.
(B) The contracting officer is required to debrief an excluded offeror in accordance with paragraph (5) only if that offeror requested and was refused a preaward debriefing under subparagraph (A).
(C) The debriefing conducted under subparagraph (A)

shall include—
(i) the executive agency's evaluation of the significant elements in the offeror's offer;
(ii) a summary of the rationale for the offeror's exclusion; and
(iii) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.
(D) The debriefing conducted under subparagraph (A) may not disclose the number or identity of other offerors and shall not disclose information about the content, ranking, or evaluation of other offerors' proposals.
(7) The contracting officer shall include a summary of any debriefing conducted under paragraph (5) or (6) in the contract file.
(8) The Federal Acquisition Regulation shall include a provision encouraging the use of alternative dispute resolution techniques to provide informal, expeditious, and inexpensive procedures for an offeror to consider using before filing a protest, prior to the award of a contract, of the exclusion of the offeror from the competitive range (or otherwise from further consideration) for that contract.
(9) If the head of an agency considers that a bid or proposal evidences a violation of the antitrust laws, he shall refer the bid or proposal to the Attorney General for appropriate action.
(c) The Secretary of Defense shall ensure that before a contract for the delivery of supplies to the Department of Defense is entered into—
(1) when the appropriate officials of the Department are making an assessment of the most advantageous source for acquisition of the supplies (considering quality, price, delivery, and other factors), there is a

review of the availability and cost of each item of supply—

(A) through the supply system of the Department of Defense; and

(B) under standard Government supply contracts, if the item is in a category of supplies defined under regulations of the Secretary of Defense as being potentially available under a standard Government supply contract; and

(2) there is a review of both the procurement history of the item and a description of the item, including, when necessary for an adequate description of the item, a picture, drawing, diagram, or other graphic representation of the item.

(d)

(1)

(A) The Secretary of Defense shall ensure that, in preparing a solicitation for the award of a development contract for a major system, the head of an agency consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) Proposals referred to in the first sentence of subparagraph (A) are the following:

(i) Proposals to incorporate in the design of the major system items which are currently available within the supply system of the Federal agency responsible for the major system, available elsewhere in the national supply system, or commercially available from more than one source.

(ii) With respect to items that are likely to be required

in substantial quantities during the system's service life, proposals to incorporate in the design of the major system items which the United States will be able to acquire competitively in the future.

(2)

(A) The Secretary of Defense shall ensure that, in preparing a solicitation for the award of a production contract for a major system, the head of an agency consider requiring in the solicitation that an offeror include in its offer proposals described in subparagraph (B). In determining whether to require such proposals, the head of the agency shall give due consideration to the purposes for which the system is being procured and the technology necessary to meet the system's required capabilities. If such proposals are required, the head of the agency shall consider them in evaluating the offeror's price.

(B) Proposals referred to in the first sentence of subparagraph (A) are proposals identifying opportunities to ensure that the United States will be able to obtain on a competitive basis items procured in connection with the system that are likely to be reprocured in substantial quantities during the service life of the system. Proposals submitted in response to such requirement may include the following:

(i) Proposals to provide to the United States the right to use technical data to be provided under the contract for competitive reprocurement of the item, together with the cost to the United States, if any, of acquiring such technical data and the right to use such data.

(ii) Proposals for the qualification or development of multiple sources of supply for the item.

(3) If the head of an agency is making a noncompetitive award of a development contract or a production contract for a major system, the factors specified in paragraphs (1) and (2) to be considered in evaluating an offer for a contract may be considered as

objectives in negotiating the contract to be awarded. Such objectives may not impair the rights of prospective contractors or subcontractors otherwise provided by law.

(4)

(A) Whenever the head of an agency requires that proposals described in paragraph (1)(B) or (2)(B) be submitted by an offeror in its offer, the offeror shall not be required to provide a proposal that enables the United States to acquire competitively in the future an identical item if the item was developed exclusively at private expense unless the head of the agency determines that—

(i) the original supplier of such item will be unable to satisfy program schedule or delivery requirements; or

(ii) proposals by the original supplier of such item to meet the mobilization requirements are insufficient to meet the agency's mobilization needs.

(B) In considering offers in response to a solicitation requiring proposals described in paragraph (1)(B) or (2)(B), the head of an agency shall base any evaluation of items developed exclusively at private expense on an analysis of the total value, in terms of innovative design, life-cycle costs, and other pertinent factors, of incorporating such items in the system.

(e) Protest File.—

(1) If, in the case of a solicitation for a contract issued by, or an award or proposed award of a contract by, the head of an agency, a protest is filed pursuant to the procedures in subchapter V of chapter 35 of title 31 and an actual or prospective offeror so requests, a file of the protest shall be established by the procuring activity and reasonable access shall be provided to actual or prospective offerors.

(2) Information exempt from disclosure under section 552 of title 5 may be redacted in a file established pursuant to paragraph (1) unless an applicable

protective order provides otherwise.

(f) Agency Actions on Protests.— If, in connection with a protest, the head of an agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of the agency—

(1) may take any action set out in subparagraphs (A) through (F) of subsection (b)(1) of section 3554 of title 31; and

(2) may pay costs described in paragraph (1) of section 3554 (c) of title 31 within the limits referred to in paragraph (2) of such section.

(g) Prohibition on Release of Contractor Proposals.—

(1) Except as provided in paragraph (2), a proposal in the possession or control of an agency named in section 2303 of this title may not be made available to any person under section 552 of title 5.

(2) Paragraph (1) does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the Department and the contractor that submitted the proposal.

(3) In this subsection, the term "proposal" means any proposal, including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.

Title 18 § 1001. Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
shall be fined under this title or imprisoned not more than 5 years, or both.
(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.
(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—
(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

Title 18 § 1003. Demands against the United States
Whoever knowingly and fraudulently demands

or endeavors to obtain any share or sum in the public stocks of the United States, or to have any part thereof transferred, assigned, sold, or conveyed, or to have any annuity, dividend, pension, wages, gratuity, or other debt due from the United States, or any part thereof, received, or paid by virtue of any false, forged, or counterfeited power of attorney, authority, or instrument, shall be fined under this title or imprisoned not more than five years, or both; but if the sum or value so obtained or attempted to be obtained does not exceed $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

Title 31 U.S.C. § 3729. False claims
(a) Liability for Certain Acts.— Any person who—
(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;
(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which

the person receives a certificate or receipt;
(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or
(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,
is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—
(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
(B) such person fully cooperated with any Government investigation of such violation; and
(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;
the court may assess not less than 2 times the

amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and Knowingly Defined.— For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim Defined.— For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption From Disclosure.— Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion.— This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

Title 31 § 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General.— The

Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by Private Persons.—

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the

action, in which case the person bringing the action shall have the right to conduct the action.
(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.
(c) Rights of the Parties to Qui Tam Actions.—
(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).
(2)
(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.
(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.
(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—
(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;
(iii) limiting the person's cross-examination of witnesses; or
(iv) otherwise limiting the participation by the person in the litigation.
(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.
(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.
(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam Plaintiff.—

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [1] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case

to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action

and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain Actions Barred.—

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)

(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)

(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [2] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney

General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government Not Liable for Certain Expenses.— The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and Expenses to Prevailing Defendant.— In civil actions brought under this section by the United States, the provisions of section 2412 (d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.